

CASE NO. (P) I 989/98

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE SOUTH AFRICAN SUGAR ASSOCIATION

APPLICANT

and

NAMIBIA SUGAR DISTRIBUTORS (PTY)LTD

RESPONDENT

CORAM: HANNAH, J.

Heard on: 1999-06-07

Delivered on: 1999-06-15

JUDGMENT:

HANNAH, J.: This is an interlocutory application brought by the applicant, the plaintiff in the trial action, against the respondent, the defendant in the action, in which the applicant seeks an order directing that the respondent makes available for inspection certain documents. The respondent opposes the application.

The background to the application is briefly as follows. By summons dated 23rd October, 1997 the applicant claimed the sum of R6040 391,81 from the respondent. The claim as set out in the amended particulars of claim is as follows. On 7th December, 1995 the applicant and the respondent entered into a written agreement. In terms of that agreement the respondent was entitled to purchase sugar from a miller in South Africa at the price prevailing in South Africa but would receive a rebate of 22% or such other amount determined by the applicant which the applicant would refund to the miller. "Miller" was defined in the agreement as any producer of sugar in South Africa deemed by the applicant to be a miller. It was a condition of the respondent's entitlement to purchase sugar at that rebate that the sugar so purchased would be transported to Namibia and consumed in Namibia. The respondent undertook that it would not sell or otherwise dispose of the imported sugar, directly or indirectly, to any person who the respondent knew or suspected would, directly or indirectly, export the sugar from Namibia to South Africa or Botswana either as sugar or in the form of another product or products containing that sugar. The agreement further provided that in the event of breach by the respondent of its undertakings the applicant would be entitled to claim from the respondent the losses suffered by it as a consequence of having refunded the rebate to the millers from whom the sugar was purchased.

The applicant alleged that during the period from 7th December, 1995 to 16th May, 1997 the respondent purchased sugar pursuant to the agreement and that the applicant paid rebates in respect of that sugar in a sum in excess of R15 million. It further alleged that not less than 40% of that sugar was, in breach of the respondent's undertaking, exported to South Africa or sold to a person who the respondent knew or suspected would directly or indirectly export such sugar to South Africa either as sugar or in the form of another product or products containing such sugar. Accordingly, the applicant claimed reimbursement of the rebates which it had paid amounting to R6 040 391,81.

In its plea the respondent admitted the purchase of sugar from millers in South Africa at a rebate but put the amount of sugar so purchased in dispute. It denied that the sugar purchased was exported to South Africa or sold to a person who it knew or suspected would export it to South Africa either as sugar or as a product containing sugar. The respondent's case is that the sugar purchased pursuant to the agreement was sold and consumed in Namibia.

It is clear from the foregoing that the primary issue in the action will be what happened to the sugar which the respondent purchased from the South African millers pursuant to the agreement. Obviously discovery is of considerable importance. In this regard the respondent provided a discovery affidavit which was manifestly defective in that it made no reference to any order, invoice, delivery note or import or export document. The applicant accordingly served a notice on the respondent in terms of Rule 35(3) of the High Court Rules. That notice required the respondent to make available to the applicant for inspection, *inter alia*,

2. All invoices and statements generated by the respondent reflecting the sale of sugar by the respondent to its customers during the period December, 1995 to 16th May, 1997;
3. All invoices and statements generated by the respondent reflecting the sale of industrial fondant by the respondent during that period.
4. All documents and records relating to the export of sugar and/or industrial fondant from Namibia to South Africa, including Customs and Excise CCA1 forms for the period December 1995 to 16th May, 1997.
5. All bank statements and deposit slips for the period December, 1995 to July, 1997 in respect of all bank accounts in the respondent's name.

In response to the Rule 35(3) notice the respondent filed a notice setting out a substantial number of documents which were available for inspection. It listed cash sale books for the period in question and delivery books including books showing sugar and industrial fondant delivered

and/or sold on credit by an entity referred to as Terra Trading. But it did not list any invoices or statements reflecting these credit sales. With regard to documents or records relating to exports it stated that these were also listed and it may be that this was a reference to correspondence between itself and the Ministry of Trade and Industry and the Department of Customs and Excise. As for bank statements and deposit slips it contended that these were irrelevant and refused the applicant's request.

The applicant was not satisfied with the respondent's notice and the present application was then brought in order to compel proper compliance with Rule 35(3). The relief sought is as

THAT the Respondent is directed to make available for inspection, accordance with Rule 35(6), the following documents:-

6. All invoices and statements relating to the sale of sugar or industrial fondant by the Respondent, TERRA TRADING or NAMIBIA SUGAR PACKERS, on credit, for the period December 1995 to the 16th May 1997.
7. All export documents to which the Respondent has referred in paragraph 8 of its Notice in terms of Rule 35(3), dated 15th October 1998.
8. All of the Defendant's Bank statements and deposit slips for the period December 1995 to July 1997, in respect of all the Respondent's Bank accounts.

The Respondent is directed to comply with the provisions of paragraph 1 of this Order within FIFTEEN (15) days after the grant thereof.

The Respondent is ordered to pay the costs of this application."

Mr Heathcote, who appeared on behalf of the respondent, began his submissions by arguing that the application was misconceived. However, I can see no merit in the argument advanced. Following the first defective discovery the applicant gave notice in terms of Rule 35(3) and the respondent responded to that notice. The applicant was not satisfied with that response and brought this application in terms of subrule (7). I can see nothing wrong with that procedure. It may be, as Mr Heathcote contended, that the reference in prayer 1 of the notice of motion to Rule 35(6) is incorrect but I do not regard the reference to that subsection as being of any real significance. The founding affidavit makes it clear that the application is brought in terms of Rule 35(7) and the reference to Rule 35(6) in the notice of motion could have been omitted altogether without any adverse effect.

In its answering affidavit the respondent avers that Terra Trading Co. (Pty) Ltd is an independent company and Mr Smuts, who appeared on behalf of the applicant, not only accepted this to be so but also accepted that Namibia Sugar Packers is also an independent entity. Mr Smuts conceded that as these two companies are not parties to the action no order can be made compelling them to produce documents for inspection. However, counsel submitted that any invoices or statements relating to the sale of sugar on credit by these two companies which happen to be in the possession of the respondent can be made the subject of an order against the respondent if the Court is satisfied on the question of relevancy. I agree with that submission. It would, of course, require a minor amendment to prayer 1.1 and despite Mr Heathcote's protestations I can see no unfair prejudice to the respondent if such an amendment were to be made. Indeed, the respondent itself included in its Rule 35(3) notice delivery books in its possession representing "all sugar and industrial fondant delivered and/or sold by NSD and Terra Trading on credit." That part of the notice then continued:

"Included herein are where deliveries were made by NSP and where clients took delivery

of goods at premises of NSD."

The parties accept that the reference to "NSP" is a reference to Namibia Sugar Packers. I will therefore amend prayer 1.1 by adding the words "in its possession" after the word "statements".

The real contest between the parties with regard to the relief sought in prayer 1.1 concerns the relevancy of the invoices and statements which the applicant wishes to inspect. Mr Heathcote submitted that the relevant information required by the applicant for the purposes of discovery can only relate to quantities of sugar sold during the relevant period and to the various customers to whom sugar was sold. The applicant's claim, said Mr Heathcote, is not based and cannot be supported by documents reflecting the price at which the respondent sold its sugar to its customers. Mr Heathcote said that the respondent has discovered over eight thousand documents including all delivery notes and cash sale documents and the information contained in the delivery notes is exactly the same as the information contained in the respondent's invoices apart from the fact that the latter also contain prices. The prices are of no relevance and accordingly the respondent should not be compelled to produce invoices and financial statements for inspection.

In support of his argument Mr Heathcote relied on the following passage in *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971(4) SA 589 (WLD) at 598 D-F:

"The test of discoverability or liability to produce for inspection, where no privilege or like protection is claimed, is still that of relevance; the oath of the party alleging non-relevance is still *prima facie* conclusive, unless it is shown on one or other of the bases referred to above that the Court ought to go behind that oath; and the onus of proving relevance, where such is denied, still rests on the party seeking discovery or inspection... Rule 35(3) could never have been intended to mean that the mere subjective belief (or even that a mere statement as to the existence of such

belief) by the party seeking further discovery, as to the relevance of additional documents, is by itself enough to require the other party on notice to make available for inspection such of those documents as are in his possession."

The bases on which the Court ought to go behind the oath were set out as follows at p. 597H-598A:

"The Court will go behind the affidavit only if it is satisfied -

- (i) from the discovery affidavit itself; or
- (ii) from the documents referred to in the discovery affidavit; or
 - 1. from the pleadings in the action; or
 - 2. (iv) from the nature of the case or the documents in issue,

that there is a probability that the party making the affidavit has or has had other relevant documents in his possession or power or has misconceived the principles upon which the affidavit should be made."

Mr Smuts has no quarrel with any of the foregoing. His submission is that it is not in dispute that the respondent has invoices in its possession relating to sales of sugar on credit which show, *inter alia*, the quantities of sugar sold and the respondent has misconceived the position when it comes to the relevancy of those documents. The fact that identical information as to quantities can be obtained from the disclosed delivery notes does not make the invoices any less relevant to the issues in the action. The invoices are different documents and they are of considerable relevance when checking whether the information contained in the delivery notes is correct. There can be no question, he submitted, that the applicant is entitled to attempt to reconcile the two classes of documents. Mr Smuts referred to *Crown Cork & Seal Co v Rheem SA (Pty) Ltd* 1980(3) SA 1093 at 1095H-1096B and in particular to the following statement of Lord Denning MR in *Riddick v Thames Board Mills Ltd* (1977) 3 All ER 677(CA) at 687 cited at 1096 B:

"The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential

information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, ie in making full disclosure."

Mr Smuts submitted that the real thrust of the respondent's answering affidavit with regard to invoices and statements is the protection of disclosure of its prices, in other words the protection of confidential information. In the circumstances of the present case that is not enough. There should be full discovery in the interest of discovering the truth.

I agree with Mr Smuts' submission. The invoices relating to the sale of the sugar on credit will probably play an important role in the exercise of reconciliation of documents and, in my view, the applicant is entitled to their production.

So far as the relief sought in prayer 1.2 is concerned, Mr Smuts accepted that no material exists for this Court to go behind the denial in the answering affidavit that no such documents exist. He submitted, however, that the applicant was entitled to seek the relief sought because the respondent had not previously stated on oath that such documents were not in its possession.

As for the relief sought in prayer 1.3, the respondent's response in the answering affidavit is that bank statements and deposit slips are irrelevant as they only contain information relating to the price of sugar sold, not quantities. Mr Smuts submitted that, as with the invoices, this is a misconception by the respondent of the relevancy of the bank statements and deposit slips. They are, he submitted, an integral part of any exercise involving the reconciliation of the respondent's sales documents so as to ascertain to whom sales of sugar were made and the quantities sold. I agree with that submission. In my view, they will, in all probability, play an important role in discovering the truth. The respondent should be required to produce them for inspection.

On the question of costs Mr Heathcote submitted that if the applicant should only be successful in

part then the proper order should be that each party pays its own costs. Mr Smuts submitted that if the applicant is substantially successful then it is entitled to its costs. In my opinion, the applicant has been substantially successful and the respondent should be ordered to pay its costs.

For the foregoing reasons the following order is made:

1. The respondent is directed to make available for inspection the following documents:-
 9. All invoices and statements in its possession relating to the sale of sugar or industrial fondant by the respondent, Terra Trading (Pty) Ltd or Namibia Sugar Packers (Pty) Ltd, on credit for the period December, 1995 to 16th May, 1997.
 10. All of the respondent's bank statements and deposit slips for the period December, 1995 to July, 1997 in respect of all the respondent's bank accounts.
 11. The respondent is directed to comply with the provisions of paragraph 1 of this order within fifteen days of the grant hereof.
 12. The respondent is ordered to pay the costs of this application.

ON BEHALF OF THE APPLICANT

Instructed by:

ADV D F SMUTS

Lorentz & Bone

ON BEHALF OF THE RESPONDENT

ADV R HEATHCOTE

Instructed by:

P F Koep & Co